No. 83-439

In The

Supreme Court of the United States

October Term, 1983

SIDNEY SILLER and SHIRLEY SILLER, his wife; IRVING GAINES and CORALIE GAINES, his wife; MARSHALL NATAPOFF and JANET NATAPOFF, his wife; FRANCIS CLARK and LUCILLE CLARK, his wife; and JOEL KRAMER, single,

Petitioners,

and

HARMON COVE CONDOMINIUM II ASSOCIATION, INC.,
Intervenor,

vs.

HARTZ MOUNTAIN ASSOCIATES, a corporation; HARMON COVE I CONDOMINIUM ASSOCIATION, INC., a corporation; and HARMON COVE RECREATION ASSOCIATION, INC., a corporation,

Respondents.

BRIEF FOR RESPONDENT HARTZ MOUNTAIN ASSOCIATES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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QUESTIONS PRESENTED

1. Whether or not this Court has jurisdiction pursuant to 28 U.S.C. §1257(3); and

2. Whether or not review should be granted pursuant to U.S. Sup. Ct. R. 17.

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CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

U.S. Const. Art. I, §10, Cl. 1 and the Fourteenth Amendment, §1 (in pertinent part) appears at page 3 of the petition for writ of certiorari.

N.J. Const. Art. I, §1:

"All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

28 U.S.C. §1257(3):

"By writ of certiorari, . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, . . . of the United States, . . ."

N.J. Stat. Ann. §§46:8B-1 *et seq.*, appears at page 54a of the appendix to the petition for writ of certiorari.

U.S. Sup. Ct. R. 17.1(b), (c):

"1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered. . . .

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

STATEMENT OF THE CASE

This respondent hereby adopts the Statement of the Case set forth in the opinion of the Supreme Court of New Jersey and appearing at pages 2a-4a of the appendix to the subject petition for writ of certiorari.

This respondent also regards pages 1a-41a and 47a-53a of the appendix to the subject petition for certiorari as a complete and accurate reproduction of those portions of the record below which are material to the consideration of the questions presented for review, while regarding the oral arguments of counsel for petitioners, albeit accurately transcribed at pages 42a-46a of said Appendix, as forming no part of the record for the purpose of determining whether or not a federal question had been timely and properly raised below. *See Zadig v. Baldwin*, 166 U.S. 485 (1897).

This respondent makes no independent reference to the record below as material to the questions presented for review inasmuch as it is unaware of any recitation or discussion of a federal question contained therein.

SUMMARY OF ARGUMENT

1. This Court does not have jurisdiction pursuant to 28 U.S.C. §1257(3) because no federal question was decided below,

the record revealing that petitioners did not raise a federal question in a timely and proper manner and that none was expressly or impliedly addressed by any of the courts below, each of which grounded their respective judgments in opinions which interpreted and applied the subject state statute as if its presumption of validity had never been challenged.

Petitioners did not forge any challenge to the constitutional validity of the statutory construction favored by respondents while before the trial court, and those challenges supposedly couched in their briefs to the New Jersey Appellate and Supreme Courts invoke the authority of the New Jersey Constitution as readily as they do the Constitution of the United States.

Thus, to the extent that a judgment which silently applies a *prima facie* presumptively valid statute would otherwise be deemed by this Court to have decided in favor of the kinetic constitutional validity of said statute by necessary implication, this respondent then contends that the judgment of the New Jersey Supreme Court in the case at bar in fact rested upon adequate and independent state grounds in that it either treated the question of constitutional validity as having been waived by lack of timely presentation at the trial level in accordance with legitimately and consistently applied state procedure, or as having been raised within the context of New Jersey constitutional provisions governing but not prohibiting the intended application of the statute.

2. Assuming that this Court has jurisdiction pursuant to 28 U.S.C. §1257(3), there are no special and important reasons to compel this Court to exercise its judicial discretion in favor of review pursuant to U.S. Sup. Ct. R. 17 because the New Jersey Supreme Court has not decided a federal question in a way which conflicts with decisions of other state courts of last resort or with applicable decisions of this Court.

The decision of the New Jersey Supreme Court in the case at bar, like those of other state courts of last resort having had occasion to consider the standing of individual condominium owners versus condominium associations, was based upon an interpretation of state statutory provisions and court rules governing local procedure in such cases made and provided. Like the New Jersey Supreme Court, none of the other state courts of last resort expressed their decisions in terms of federal constitutionality and the conflict among them, if any, arises purely from legitimate differences in the exercise of legislative police powers and judicial supervisory powers peculiar to each of the states which this Court has repeatedly recognized as consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution; such that petitioners' claims of constitutional violations do not rise to the level of substantiality necessary to compel review by this Court.

REASONS FOR DENYING THE WRIT

I.

THIS COURT DOES NOT HAVE JURISDICTION PURSUANT TO 28 U.S.C. §1257(3) BECAUSE THE DECISION BELOW RESTS UPON ADEQUATE AND INDEPENDENT STATE GROUNDS.

The subject petition for certiorari dictates that this Court's power to review the final judgment rendered by the Supreme Court of New Jersey in the case at bar depends exclusively upon whether or not the validity of the New Jersey Condominium Act, N.J. Stat. Ann. §§46:8B-1 *et seq.* (West, 1983), was drawn in question on the ground of its being repugnant to the Constitution of the United States. 28 U.S.C. §1257(3) (LCP, 1977). Although no particular form of words or phrases is essential to obtain this

end, the record must clearly show that a claim of invalidity and the ground therefor was brought to the attention of the state court with fair precision and in due time. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Street v. New York*, 394 U.S. 576, 580 (1969); *Webb v. Webb*, 451 U.S. 493, 496-499 (1981). Such was not the case here.

Petitioners' own references to the record below fail to clearly demonstrate that their present claims of constitutional infirmities were brought to the attention of the trial court with fair precision (40a). Indeed, the trial court opinion directly responded to petitioners' broadly couched argument by focusing upon the proper construction to be given to the Condominium Act and not upon whether such construction was in any way repugnant to the Constitution of the United States (27a-28a), and the judgment of the trial court was affirmed by the Appellate Division *per curiam* on opinion below (18a) despite the fact that petitioners had made reference to "equal rights" and "due process of law" in their appellate brief (47a-50a).

Petitioners' first legitimate reference to the Constitution of the United States was coupled with the New Jersey Constitution in a portion of its petition to the New Jersey Supreme Court wherein due process and equal protection were briefly discussed as protections provided by both Constitutions (52a). No express or implied reference to the constitutional provision prohibiting state laws impairing the obligation of contracts, U.S. Const. Art. I, §10, cl. 1, was ever placed upon the record below.

Had the New Jersey Supreme Court expressly decided that the New Jersey Condominium Act passed United States constitutional muster, then the question whether petitioners had timely and properly raised the issue on the record below would be of no moment. *Charleston Federal Savings & Loan Asso. v. Alderson*, 324 U.S. 182, *reh. den.*, 324 U.S. 888 (1945). However,

the conspicuous absence of any reference to the Constitution of the United States in the decision of that Court causes the method of petitioners' constitutional challenges to bear heavily upon the critical question whether the New Jersey Supreme Court based its decision upon adequate and independent state grounds which would thereby deprive this Court of jurisdiction. *See, e.g., Stembridge v. Georgia,* 343 U.S. 541 (1952).

It is a well-settled principle of New Jersey procedural law that appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available, unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest. *Nieder v. Royal Indemnity Insurance Co.,* 62 N.J. 229, 234, 300 A. 2d 142 (1973); *see, e.g., Cox v. Valley Fair Corp.,* 83 N.J. 381, 386-387, 416 A. 2d 809 (1980).

A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power. *Williams v. Georgia,* 349 U.S. 375, 382-383 (1955). Indeed, the failure to present a federal question in conformance with state procedure constitutes an adequate and independent state ground of decision barring review in this Court, so long as the state has a legitimate interest in enforcing its procedural rule. *Michigan v. Tyler,* 436 U.S. 499, 512 at n.7 (1978); *Hathorne v. Lovorn,* 457 U.S. 255 (1982).

It should be clear, then, that this Court is without power to decide whether petitioners' constitutional rights have been violated since those rights were not raised in accordance with established New Jersey practice, *see, e.g., Copperweld Steel Co. v. Industrial Com.,* 324 U.S. 780 (1945); *Edelman v. California,* 344 U.S. 357, 358-359 (1953), the failure of the New Jersey Supreme Court to discuss the same calling for this Court's exercise

of judicial discretion in favor of the abstentionary presumption that the judgment in this case rested upon state rather than federal grounds. *Cf., Lynch v. New York,* 292 U.S. 52 (1934); *Durley v. Mayo,* 351 U.S. 277 (1956); *Black v. Cutter Laboratories,* 351 U.S. 292 (1956).

A parallel presumption pertains where, as here, petitioners' ultimate references to due process and equal protection were made in connection with both the United States and New Jersey Constitutions, *see* N.J. Const. Art. I, Sec. 1, cl. 1; *see generally, Horsman Dolls v. Unemployment Compensation Commission,* 7 N.J. 541, 82 A. 2d 177 (1951), *appeal dismissed,* 342 U.S. 890; *Peper v. Princeton University Bd. of Trustees,* 77 N.J. 55, 389 A. 2d 465 (1978) and the judgment of the New Jersey Supreme Court, by its silence, could have as readily rested upon the latter as upon the former. *Cf., Zadig v. Baldwin,* 166 U.S. 485 (1897); *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.,* 228 U.S. 326, *reh. den.,* 228 U.S. 596 (1913); *Mental Hygiene Dept. of Cal. v. Kirchner,* 380 U.S. 194 (1965).

II.

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING REVIEW PURSUANT TO U.S. SUP. CT. R. 17.

A. There is no interstate conflict of decisions about a federal question.

Just as jurisdiction arises only if implications of constitutional validity must be derived from the New Jersey Supreme Court judgment otherwise silent on the subject, U.S. Sup. Ct. R. 17.1(b) can be invoked only if contrary implications are necessarily derived from the equally silent judgments of the other state courts of last resort relied upon by petitioners (Petition at pp. 19-21); that rule

regarding such conflicts in constitutional decision-making as material to the question whether or not there exist special and important reasons for a discretionary grant of review by this Court.

However, petitioners' argument in favor of the existence of such a conflict cannot withstand analysis, for each of those state courts which gave standing to condominium unit owners expressly did so because they found that their respective state rules of local procedure so provided and not because a contrary interpretation of such rules would have proven unconstitutional. Reasoning of the latter respect would have required equal expression and would have, in any event, transcended those boundaries of judicial review firmly established by the immutable doctrine of abstention (citations too numerous to mention).

B. The New Jersey Supreme Court has not decided a substantial federal question unsettled by or in conflict with decisions of this Court.

This Court's power over state courts is confined to the correction of erroneous adjudications of federal rights. It is not in the business of rendering advisory opinions. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977). Jurisdiction should therefore be exercised only when the federal questions presented for review are real and substantial, *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 596 (1913); *Zucht v. King*, 260 U.S. 174 (1922); *Wick v. Chelan Electric Co.*, 280 U.S. 108 (1929), characteristics not apparent herein.

An individual may lack standing under the prudential principles by which the judiciary seeks to limit access to the courts to those litigants best suited to assert a particular claim. *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 99-100 (1979). For example, in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977), it was held that an association has standing to bring

suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and, (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members, 432 U.S. at 342-343, *citing Warth v. Seldin*, 422 U.S. 490, 499 (1975).

It was just such a policy of judicial procedure which embodied the opinion in *Crescent Pk. Tenants Asso. v. Realty Eq. Corp. of N.Y.*, 58 N.J. 98 (1971) and which the New Jersey Supreme Court found to be favorably inherent in the New Jersey Condominium Act (9a). Thus, its judgment in the case at bar can hardly be said to pose a substantial conflict with the decisions of this Court or to raise a federal question of sufficient novelty or import to warrant this Court's attention.

i. The adoption of the New Jersey Condominium Act did not impair the obligations of contract between petitioners and this respondent.

Ignoring for a moment the fact that the impairment of contractual obligations was never raised in arguments anywhere below, review and application of the case law interpreting U.S. Const. Art. I, Sec. 10, cl. 1, not only reveals the frivolous nature of such a claim, but serves as an important prelude to the consideration of due process and equal protection principles.

Because the ownership of New Jersey condominiums is governed by the statute under which this respondent planned, designed and developed the subject Harmon Cove complexes, petitioners' rights thereto perforce arose subsequent and subject to said statute. *See* Petition at page 3-4; N.J. Stat. Ann., §§46:8B-1 *et seq.*

However, the inhibition of the Contract Clause is wholly prospective, *i.e.*, only those contracts in existence when the hostile law is passed are protected from its effect, *Denny v. Bennet*, 128 U.S. 489 (1888); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), whereas contracts made subsequent to an enactment of a statute are subject to its terms, *see Denny v. Bennet, supra; Blackstone v. Miller*, 188 U.S. 189 (1903); *Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Wood v. Lovett*, 313 U.S. 361 (1941), and to the construction given them by the highest state court. *Louisiana v. Pilsbury*, 105 U.S. 278 (1882).

Moreover, a vested property right of statutory origin is not a contract right subject to the Contract Clause, *Crane v. Hahlo*, 258 U.S. 142 (1922), and purchases governed by statute are not impaired by amendments to that statute, *Veix v. Sixth Ward Bldg. and Loan Asso. of Newark*, 310 U.S. 32 (1940); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Nor are contractual obligations entered into on the faith of a certain construction of a statute impaired by a different construction given to the statute by the state's highest court. *Fleming v. Fleming*, 264 U.S. 29 (1924).

Thus, petitioners' present claims of contract impairment are contrary to this Court's controlling case law and to the New Jersey Supreme Court's construction of the Condominium Act itself, whereby the protection of common element ownership rights created and arising thereunder is exclusively entrusted to the statutorily mandated associations designed for such purposes (5a-14a).

Indeed, when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the state to safeguard the vital interests of its people is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated

private contract constitutionally immune from impairment. *East New York Savings Bank v. Hahn*, 326 U.S. 230, 232 (1945); *see, e.g., Home Building and Loan Asso. v. Blaisdell*, 290 U.S. 398 (1934); *Honeyman v. Hanan*, 302 U.S. 375 (1937).

ii. Petitioners have not been deprived of equal protection of law.

The Equal Protection Clause directs that all persons similarly circumstanced should be treated alike, but does not require that things which are different in fact or opinion be treated in law as if they were the same. The initial discretion to determine what is different and what is the same resides in the Legislature of the states. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns, both public and private, and that account for limitations on the practical ability of the state to remedy every ill. In applying the Equal Protection Clause to most forms of state action, this Court thus seeks only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose. *Plyler v. Doe*, 457 U.S. 202 (1982).

As construed by the New Jersey Supreme Court, the New Jersey Condominium Act is one such form of legitimate state action inasmuch as it rationally distinguishes condominium common element ownership from purely individual forms of real estate ownership for the purpose of promoting the economical, expedient, judicial administration and resolution of disputes arising out of such ownership (8a-14a), for the Equal Protection Clause does not exact uniformity of procedure. The legislature may classify litigation and adopt one type of procedure for one class and a different type for another. *See Dohany v. Rogers*, 281 U.S. 362, 369 (1930); *Gibbes v. Zimmerman*, 290 U.S. 326 (1933).

For example, in *G.D. Searle & Company v. Cohn*, 455 U.S. 404 (1982), it was held that N.J. Stat. Ann. §2A:14-22, which tolls the limitation period for an action against a foreign corporation which is amenable to jurisdiction but has no agent for service in New Jersey, does not violate the Equal Protection Clause because of the existence of a rational basis for treating such corporations differently from others due to the difficulty in effectuating lawful service of process upon them. *See also, e.g., American Motorists Ins. Co. v. Starnes*, 425 U.S. 637 (1976) (upholding venue statute); *Lindsey v. Normet*, 405 U.S. 56 (1972) (upholding statute limiting time within which to bring actions based upon out-of-state judgments); *Jones v. Union Guano Co.*, 264 U.S. 171 (1924) (upholding conditions precedent to institution of certain types of litigation).

iii. Petitioners have not been deprived of due process of law.

Due process is not a technical conception with a fixed content unrelated to time, place and circumstances. Representing a profound attitude of fairness, due process is compounded of history, reason, the past course of decisions and strict confidence in democracy. *Ingraham v. Wright*, 430 U.S. 651, 675 (1977). It is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

The Due Process Clause raises no impenetrable barrier to the taking of a person's possessions. Procedural due process rules are meant to protect persons not from deprivations, but from the mistaken or unjustified deprivation of life, liberty or property. Thus, in deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that procedural due process rules are shaped by the risk of error inherent in the truth finding process. *Carey v. Piphus*, 435 U.S. 247, 259 (1978); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979).

Due process is a term that negates any concept of inflexible procedures universally applicable to every imaginable situation. Determining what process is due in a given setting requires the Court to take into account the individual's stake in the decision at issue as well as the state's interest in a particular procedure for making it. *Hortonville District v. Hortonville Education Asso.*, 426 U.S. 482, 494 (1976); *Schwelker v. McClure*, 456 U.S. 188 (1982); *see, e.g., Benz v. New York State Thruway Authority*, 369 U.S. 147 (1962).

The Due Process Clause does not guarantee to the citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice and opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it. *Dohany v. Rogers*, 281 U.S. 362, 369 (1930); *Gibbes v. Zimmerman*, 290 U.S. 326 (1933); *Honeyman v. Hanan*, 302 U.S. 375 (1937).

The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. In the exercise of that power and to satisfy a public need, a state may choose the remedy best adopted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary and the procedure it adopts satisfies the requirements of reasonable notice and opportunity to be heard. The requirements of the Fourteenth Amendment are met if a substitute remedy is substantial and efficient. *Hardware D. Mt. F. Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158-159 (1931).

According to the New Jersey Supreme Court, the New Jersey Condominium Act, N.J. Stat. Ann. §46:8B-1, *et seq.*, in conjunction with other applicable state procedural rules, collectively assigns condominium common element owner redress rights to the responsibility of a single association specifically

designed to safeguard such rights, while providing no bar to an owner's challenge to the exercise of that responsibility by the association, nor to the institution of individual suits based upon the exclusive ownership of a condominium unit (5a-16a). So construed, the Act represents an exemplary accommodation of both individual and state interests consistent with the aforestated principles of due process and presents no substantial federal question requiring review by this Court.

CONCLUSION

For all of the foregoing reasons, this respondent respectfully requests that the subject petition for writ of certiorari be denied for lack of jurisdiction, declined for lack of special and important reasons or summarily dismissed for failure to satisfactorily demonstrate a violation of the United States Constitution.

Respectfully submitted,

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